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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	MM Docket No. 88-400
Gonzales Broadcasting, Inc.	)	File No. BPH-870707MJ
Bolton Broadcasting, Limited	)	File No. BPH-870710MD
Voth Broadcasting Company	)	File No. BPH-870710MF
Metropolitan Management Corporation	)	File No. BPH-870710MY
Lorenzo Jelks	)	File No. BPH-870710MZ
QRW Partners Limited Partnership	)	File No. BPH-870710NF
Mableton Communications, Limited	)	File No. BPH-870710NQ

For a Construction Permit for a
New FM Broadcast Station on
Channel 273A at Mableton, Georgia

To: The Commission

REPLY TO JOINT OPPOSITION TO MOTION FOR *NUNC PRO TUNC* REINSTATEMENT OF APPLICATION AND ISSUANCE OF ORDER IDENTIFYING BIDDERS

Lorenzo Jelks ("Jelks"), acting pursuant to Section 1.45(b) of the Commission's Rules, hereby replies to the Joint Opposition to Motion of Lorenzo Jelks (the "Joint Opposition") filed by the other applicants for the construction permit for the new radio station in Mableton, Georgia. The Joint Opposition constitutes an emotional response to Jelks' motion for independent action by the Commission to reinstate Jelks' application without regard to the merits of the Commission's earlier rulings, which were then still under review by the courts. Despite the heat of its rhetoric, the Joint Opposition

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mischaracterizes the nature of Jelks' motion and the authority of the Commission to grant that motion. In support of that conclusion, the following is stated:

1. The Joint Opposition contends that Jelks' motion cannot satisfy the certification requirement of Section 1.52 of the Commission's rules because "the law in this area has long been settled and contradicts Jelks' position." Joint Opposition at 3. If there is any principle that is settled in administrative law, it is the general principle that courts and administrative agencies retain considerable discretion to adopt orders which serve the ends of justice. On that basis, there is substantial precedent to support Jelks' position.

2. There is no better example than *Richardson v. Wright*, 405 U.S. 208 (1972). In that case, a lower court had issued a decision that regulations of the Department of Health, Education, and Welfare ("HEW") were unconstitutional because they deprived the respondent of that party's constitutional right to participate in an administrative proceeding. While the matter was pending before the United States Supreme Court, HEW changed the very regulations under review, thereby prompting the Court to remand the matter to HEW *sua sponte* to determine whether the case before it had become moot. 405 U.S. at 209.

3. That same reasoning applies to Jelks' situation. While Jelks' appeal was pending before the courts, the Commission, like HEW in *Richardson*, took independent action which afforded Jelks certain rights to participate in an auction without regard to the merits of Jelks' pending appeal. Consequently, Jelks' motion did not request a re-adjudication of the merits of the Commission decision that Jelks was not financially qualified. Rather, Jelks argued that, like HEW in *Richardson*, the Commission could,

independent of the merits of its decision that Jelks was not financially qualified, take action to implement new rules and policies that were adopted after the Commission made its decision on Jelks' application.[1]

4. To be sure, there are decisions in which a court has stated that the FCC has no authority to conduct further proceedings with respect to a particular application after an appeal has been filed with the United States Court of Appeals. *See* Joint Opposition at 3 and sources cited therein. However, those cases are tied to the particulars of the facts and did not account for the unusual situation which confronted Jelks – namely, the issuance of an independent Commission order which breathed new life into his application.[2]

5. In sum, then, Jelks' motion did not constitute any effort by Jelks to deprive the courts of jurisdiction over the Commission's earlier adjudication of Jelks' application.[3]

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[1] It is true that Commission counsel opposed Jelks' motion for remand with the United States Court of Appeals for the District of Columbia Circuit. But that opposition is not tantamount to a separate Commission decision on the separate request by Jelks for reinstatement *nunc pro tunc*. The court's denial of Jelks' remand motion was not accompanied by an opinion. Therefore, the denial cannot be taken as a necessary bar to Jelks' instant request for reinstatement of his application *nunc pro tunc*.

[2] It is noteworthy that Judge Leventhal's opinion in *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971), cited in the Joint Opposition, was issued before the issuance of the court's decision in *Richardson*.

[3] The Joint Opposition's reliance on *Exxon Corporation v. Train*, 554 F.2d 1310 (5th Cir. 1977), is also misplaced. In that case, the Environmental Protection Agency issued a decision in a blatant attempt to deprive Exxon Corporation of its statutory right to file a petition for review with the court of appeals. The court rightfully concluded that "[s]uch unilateral agency action can have no effect on [its] jurisdiction over the petition for review." 554 F.2d at 1316 (citations omitted). The relief requested by Jelks cannot be likened to the action taken by the EPA in that latter case. Jelks stated that he would have sought a dismissal of his Petition for a Writ of Certiorari if the Commission granted the instant motion before the Court ruled on that petition. *See Steele v. FCC*, 770 F.2d 1192 (D.C. Cir.), *vacated*, *Steele v. FCC*, No. 84-1176 (D.C. Cir. October 31, 1985)(*en banc*)(remand motion granted after panel decision vacated and rehearing ordered because, *inter alia*, the motion was supported by the party challenging the policy under issue).

The Supreme Court has denied Jelks' cert. petition, and the adjudication of Jelks' application on the merits has now been finally resolved.[4] However, that action does not deprive the Commission of the opportunity to reinstate that application *nunc pro tunc* on the basis of separate action which the agency itself has taken. In short, the Commission still has the authority, in light of its independent action, in MM Docket No. 97-234, to grant the relief requested by Jelks.[5]

[4] The Court's denial of Jelks' cert. petition does not, as the Joint Opposition implies, signify that Jelks' appeals have been meritless. The Court denies all but a few of the thousands of cert. petitions filed each year.

[5] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Filed Service Licenses*, 13 FCC Rcd. 15920, 15952-53 (August 18, 1998), *petitions for reconsideration pending.*

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that Jelks' application be reinstated *nunc pro tunc.*

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 1999, copies of the foregoing REPLY TO JOINT OPPOSITION TO MOTION FOR *NUNC PRO TUNC* REINSTATEMENT OF APPLICATION AND ISSUANCE OF ORDER IDENTIFYING BIDDERS were sent by first-class mail, postage prepaid, to the following parties:

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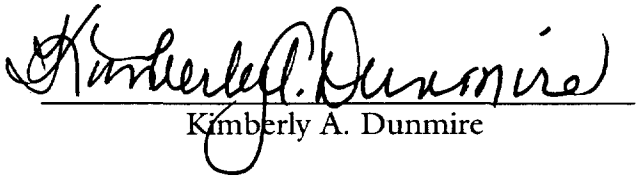

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